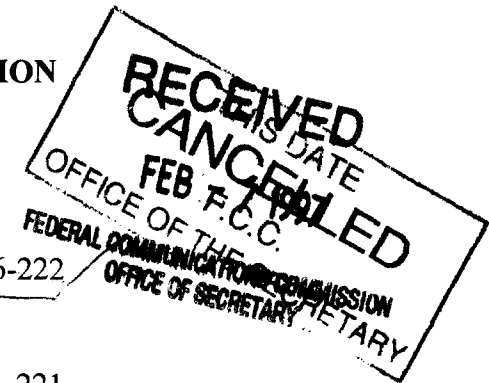


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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554



In re:

Broadcast Television National
Ownership Rules

MM Docket No. 96-222

Review of Commission's Regulations
Governing Television Broadcasting

MM Docket No. 91-221

Television Satellite Stations
Review of Policy and Rules

MM Docket No. 87-8

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To: The Commission

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

COMMENTS OF BET HOLDINGS INC.

BET HOLDINGS, INC.

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Dated: February 10, 1997

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Executive Summary

The Federal Communications Commission ("FCC" or "Commission") must evaluate the cumulative impact of recent changes to broadcast television rules before it adopts the proposed rules in this and related broadcast ownership proceedings.^{1/} The FCC's decisions in these proceedings will ultimately determine whether new entrants will have any opportunity to participate in broadcasting as it moves to the digital age, or whether regulatory and competitive entry barriers will be so high that incumbent broadcasters will dominate the broadcast marketplace. The Commission's statutory diversity obligations pursuant to Section 307(b), the impact of recent changes to broadcast licensing rules and digital television rules pursuant to the 1996 Telecommunications Act, and the Commission's broadcast public interest obligations, must be assessed in the aggregate when considering further changes to broadcast ownership and attribution rules.

Section 307(b) of the Act^{2/} mandates that the Commission distribute licenses in a fair, efficient and equitable manner. The Commission's Section 307(b) obligation is not ameliorated

^{1/} To assess the impact on consolidation and diversity of ownership in TV broadcasting, the FCC must analyze the overall impact of its pending actions in the Digital Television licensing proceeding as well as the following ownership/attribution proceedings. 1) Broadcast Television National Ownership Rules (MM Docket No. 96-222); Review of the Commission's Regulations Governing Broadcast Television (MM Docket No. 91-221); Television Satellite Stations Review of Policy and Rules (MM Docket No. 87-8), Notice of Proposed Rulemaking, FCC 96-437, released November 7, 1996 (hereinafter, "National Ownership Proceeding"); 2) Review of the Commission's Regulations Governing Broadcast Television, MM Docket No. 91-221 and Television Satellite Stations Review of Policy and Rules, MM Docket No. 87-7, Second Further Notice of Proposed Rulemaking, FCC 96-438, released November 7, 1996 ("Local Ownership Proceeding"), and Review of the Commission's Regulations Governing Attribution of Broadcast and Cable/MDS Interests, MM Docket No. 94-150, Review of the Commission's Regulations and Policies Affecting Investment in the Broadcast Industry, MM Docket No. 92-51, and Reexamination of the Commission's Cross-Interest Policy, Further Notice of Proposed Rulemaking, MM Docket No. 87-154, FCC 92-436, released November 7, 1996 (hereinafter, "Attribution Proceeding").

^{2/} "[T]he Commission shall make such distribution of licenses, frequencies, hours of operation, and of power among the several states and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same." Section 307(b) of the Communications Act of 1934, as

by the fact that "over-the-air" broadcast television competes with other video services, such as cable or VCRs. Over-the-air broadcasting is the only place where the Commission can foster "a universal forum for the exchange of national and local discourse that is available to all members of the public [because] . . . unlike other services, broadcast television is freely accessible to everyone."^{3/} For potential new entrants, obtaining a broadcast license is the last opportunity to enter the media marketplace. The capital requirements for entry into cable or Direct Broadcast Satellite ("DBS") are too high for most local businesses.^{4/}

The Commission must uphold its statutory mandate to eliminate market entry barriers and ensure that small businesses are not foreclosed from participating in the ongoing communications revolution.^{5/} In this context, the Commission must consider the effects of ownership concentration and predictability of access to capital for new entrants into

amended (hereinafter, "Act"), 47 U.S.C. § 307(b).

^{3/} Comments of Black Citizens for a Fair Media, et. al., in Review of the Commission's Regulations Governing Television Broadcasting, MM Docket No. 91-221, filed May 17, 1995, at 19-20. Broadcasters are trustees of the public airwaves and must serve the public interest in their programming. Local programming is an important component of the broadcasters' public interest obligation. Similar local programming requirements are not imposed on other video providers, such as DBS licensees. See Id. at 15-31. Local broadcasters continue to supplement DBS service with local programming, as well as provide 61% of the programming viewed by cable systems. Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, Third Annual Report, FCC 96-496, at p. 50-51, released January 2, 1997 (hereinafter, "Report").

^{4/} The January, 1996 DBS auction winner bid \$682 million for the licenses. For the first nine months of 1996, 81 cable transactions totaling \$15.6 billion dollars, or \$2,078 per subscriber, were announced. Report, supra note 3, at 11.

^{5/} In the Matter of Section 257 Proceeding to Identify and Eliminate Market Entry Barriers for Small Businesses, GN Docket No. 96-113 Notice of Inquiry, 11 FCC Rcd 6280 (1996).

broadcasting.^{6/} The Commission also has a statutory mandate to ensure that the public interest, convenience, or necessity will be served by grant of broadcast licenses.^{7/}

Diversity of sources of information is a critical element of the public interest calculus. It has been a "fundamental purpose" of Commission regulation of broadcasting for nearly 50 years "to promote diversification of ownership in order to maximize diversification of program and service viewpoints."^{8/} Diversification of control of the broadcast media is particularly desirable where, as here, a government licensing system limits access by the public to the use of television facilities.^{9/} As the U.S. Supreme Court has noted, the First Amendment "rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public."^{10/} The courts have also noted the importance of government's actions not being the cause of concentration of control of the sources of news and opinion.^{11/}

BET urges the Commission to use the television broadcast market as the relevant market for examining competitive entry barriers. Thus, the Commission should assess the impact of its actions on consolidation problems within the broadcast TV market. The market definition of multichannel video programming delivery, which is based on the definition of a cable system and uses cable franchise areas as the relevant geographic market, is not the correct market definition

^{6/} See, *Id.* at 6287, citing Competitive Bidding Fifth Report and Order, 9 FCC Rcd 5532, 5535 (1994).

^{7/} 47 U.S.C. § 307(a); 47 U.S.C. 309(a).

^{8/} Amendment of Sections 3.35, 3.240, and 3.636 of Rules and Regulations Relating to Multiple Ownership of AM, FM and Television Broadcast Stations (Report and Order), 18 FCC 288, 291 (1953).

^{9/} Policy Statement of Comparative Broadcast Hearings, 1 FCC 2d 393, 394 (1965).

^{10/} Associated Press v. U.S., 326 U.S. 1, 20 (1945).

^{11/} Scripps-Howard Radio, Inc. v. F.C.C., 189 F.2d 677 (D.C. Cir. (1951), *cert denied*, 342 U.S. 830.

to examine proposed changes in the over-the-air, broadcast television market.^{12/} Unless the Commission uses the broadcasting market to examine the effect of any proposed changes, Section 307(b) diversity obligations will be effectively "written out" of the Communications Act.

Consolidation of TV broadcast ownership will increase significantly because of several factors: 1) changes to FCC broadcast licensing procedures, 2) changes to FCC national ownership rules, 3) deregulation of the financial interest and syndication restrictions, and 4) the Digital Television ("DTV") licensing plan. An unprecedented number of mergers and acquisitions have occurred since elimination of the financial interest and syndication rules and passage of the Telecommunications Act of 1996 (the "Telecom Act").^{13/} Over \$10 billion in television transactions occurred in 1996, more than doubling the \$4.6 billion that occurred in 1995.^{14/} Without careful consideration of these factors, further actions by the FCC to relax TV ownership and attribution rules will increase broadcast ownership concentration among a small group of incumbent broadcasters and create insurmountable barriers to new entrants in digital, as well as analog, TV broadcasting.

Recent changes to the broadcast licensing rules also will hasten the further concentration of broadcast ownership. The Commission has lengthened the broadcast license terms of television stations from 5 years to 8 years,^{15/} implemented a new two-step broadcast renewal

^{12/} This multi-channel video programming market analysis derives from the cable regulation set forth in the Cable Television Consumer Protection and Competition Act of 1992, Public L. No. 102-385, 106 Stat. 1460 (1992).

^{13/} Pub. L. 104-104, 110 Stat. 56 (1996).

^{14/} "Consolidation Yea or Nay," Broadcasting and Cable, p. 4, January 27, 1997.

^{15/} Implementation of Section 203 of the Telecommunications Act of 1996 (Broadcast License Terms) Sections 73.1020 and 74.15, 12 FCC Rcd ____, MM Docket No. 96-60, FCC 97-17, released January 24, 1997.

process that eliminates comparative renewal hearings and essentially renews broadcast licenses automatically,^{16/} and "frozen" applications for new television station allotments.^{17/} These rules severely curtail the opportunity for new entrants to acquire television licenses. Existing broadcasters keep their licenses longer, and are virtually assured of license renewal. In addition, new entrants cannot file applications for new, competing stations.^{18/} While new entrants are frozen out of the broadcast TV markets, incumbent broadcasters can continue to combine with other incumbents to increase their market presence, up to 35% of the national audience.^{19/}

The DTV licensing process also will magnify incumbent broadcasters' market power. The FCC has proposed that each incumbent "full-service" broadcaster will be given an additional 6 MHz channel to implement DTV.^{20/} The Commission has also adopted DTV technical

^{16/} Renewal expectancies are granted provided the licensee has met certain public interest requirements. Implementation of Sections 204(a) and 204(c) of the Telecommunications Act of 1996 (Broadcast License Renewal Procedures) 11 FCC Rcd 6363 (1996).

^{17/} The Commission froze applications for the top 30 broadcast markets in 1987. Advanced Television Systems and Their Impact Upon Existing Television Broadcast Service, MM Dkt. No. 87-268, Order, 2 FCC Rcd 5125 (1987). The Commission froze remaining markets on September 20, 1996, and also provided that any applications filed after October 24, 1991 that had not yet been granted would not receive a 6 MHz DTV channel. Advanced Television Systems and Their Impact Upon Existing Television Broadcast Service, MM Docket 87-268, Sixth Further Notice of Proposed Rulemaking, 11 FCC Rcd 10968, 10973 (1996). The Commission has also frozen processing of all mutually exclusive application cases, creating further barriers to new entrants. See Bechtel v. F.C.C., 10 F.3d 875 (D.C. Cir. 1993), FCC Public Notice, "FCC Freezes Comparative Hearing Proceedings," 9 FCC Rcd 1055 (1994), as modified, 9 FCC Rcd 6689 (1995).

^{18/} Id. at 11013.

^{19/} Order, FCC 96-91, released March 8, 1996, 61 FR 10691.

^{20/} Memorandum Opinion and Order/Third Report and Order/Third Notice of Proposed Rulemaking, MM Docket 87-268, 7 FCC Rcd 6924, 6926 (1992). The Act requires initial DTV licenses to be allocated to incumbents for free. Broadcasters must pay spectrum fees for providing ancillary services on these DTV channels. 47 U.S.C. § 336(e). The value of the DTV spectrum, if auctioned, has been estimated between \$10 and \$70 billion. "The Great HDTV Swindle," Wired, p. 57, 60, February 1997. The Congressional Budget Office ("CBO") has scored the DTV spectrum at \$12 billion if it were auctioned. Joint Statement of David H. Moore and Perry C. Beider, Congressional Budget Office, before the Subcommittee on Telecommunications and Finance, Committee on Commerce, U.S. House of Representatives, March 21, 1996, at 13.

standards that will allow existing broadcasters to provide multiple streams of standard definition programming.^{21/} Further, spectrum flexibility allows DTV channels to be used for other types of wireless communication services.^{22/} Thus, the extra DTV channel that the Federal Communications Commission will give away for free to incumbent "full power" broadcasters doubles the amount of spectrum allocated to incumbent TV broadcasters and increases their broadcast market power exponentially.^{23/}

Against the backdrop of recent changes to existing rules, the Commission has proposed changes to local and national ownership rules and attribution rules that will increase concentration among incumbent broadcasters. Specifically, in three related proceedings, the Commission proposed 1) modifications in the calculation of national audience reach,^{24/} 2) proposed to use a Grade A contour instead of a Grade B contour for calculating permitted local ownership structures,^{25/} 3) proposed changes to the attribution rules that will decrease

^{21/} Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service, Fourth Report and Order, 11 FCC Rcd ____, MM Docket 87-268, released December 27, 1996, at 4.

^{22/} Id.

^{23/} "The acquisition by broadcasters of an additional license (apparently at no charge), then, is more than a property rights grab without parallel in the United States since the days of our previous robber barons, the railroads. It is also an extraordinary denial of our professed commitments to increase competition, to lower entry barriers, and to expand opportunities for historically excluded persons in the broadcasting industry." Krattenmaker, Thomas G., "The Telecommunications Act of 1996," Federal Communications Bar Journal, November 1996. The Telecommunications Act of 1996 also "exacerbates a fundamental flaw in our regulatory policy toward broadcasting: the use of spectrum allocation to confer market power on a closed class of privileged broadcasters." Id. at 41.

^{24/} National Ownership Proceeding, supra n. 1 at 1-2.

^{25/} Local Ownership Proceeding, supra n. 1 at 7.

predictability and flexibility,^{26/} and 4) proposed changes to the treatment of TV Satellite stations, LMAs, and JSAs for the purposes of the national and local ownership caps.^{27/}

In considering comments in these proceedings, the Commission should "resist pressure from those who urge the Commission to restrict market forces in order to protect their private interests rather than to promote the public interest."^{28/} BET urges the Commission to prevent further concentration of broadcast ownership and avoid creating potential market entry barriers to new entrants as it considers changes to these rules. In considering market entry and public interest factors, the Commission should take special note of the minorities, women and small businesses. Minority-owned businesses only hold 3% of all television broadcast licenses.^{29/} Empirical studies have demonstrated a strong correlation between ownership by minority businesses and diversity of programming.^{30/} Congress has also eliminated tax certificates to promote minority and women ownership in television.^{31/} More recently, the Commission has proposed rules that will reduce the enforcement of equal opportunity recruitment and hiring of minority and women applicants.^{32/} By providing incentives for new entrants to participate in TV

^{26/} Attribution Proceeding, supra n. 1 at 5.

^{27/} National Ownership Proceeding, supra n. 1 at 9-10, Attribution Proceeding, supra n. 1 at 26, 32.

^{28/} Using Market-Based Spectrum Policy to Promote the Public Interest, Gregory L. Rosston and Jeffrey S. Steinberg, Federal Communications Commission, January 1997.

^{29/} Minority Commercial Broadcast Ownership in the United States. The Minority Telecommunications Development Program, National Telecommunications and Information Administration, United States Department of Commerce, April, 1996.

^{30/} Congressional Research Service, Minority Broadcast Station Ownership and Broadcast Programming: Is there a nexus? (June 29, 1986 at 13, 15.).

^{31/} Self-Employed Health Insurance Act of 1995, Pub. L. No. 104-7, §2, 109 Stat. 93 (1995).

^{32/} Streamlining Broadcast EEO Rule and Policies, Vacating the EEO Forfeiture Policy Statement and Amending Section 1.80 of the Commission's Rules to Include EEO Forfeiture Guidelines, Notice of Proposed Rulemaking, 11 FCC Rcd 5154 (1996).

broadcasting, the Commission will promote its 307(b) diversity public interest obligation by increasing the pool of potential participants among minorities, women, and small businesses. BET encourages the FCC to adopt incentives for new entrant participation in broadcasting, which would satisfy the Commission's statutory obligation to fairly and equitably distribute licenses, eliminate market entry barriers, and serve the public interest. BET specifically addresses the issues raised in the "national ownership" proceeding below.^{33/}

^{33/} BET is filing comments simultaneously in the Commission's three related broadcast attribution and ownership proceedings: 1) Broadcast Television National Ownership Rules (MM Docket No. 96-222); Review of the Commission's Regulations Governing Broadcast Television (MM Docket No. 91-221); Television Satellite Stations Review of Policy and Rules (MM Docket No. 87-8), Notice of Proposed Rulemaking, FCC 96-437; released November 7, 1996; 2) Review of the Commission's Regulations Governing Broadcast Television, MM Docket No. 91-221 and Television Satellite Stations Review of Policy and Rules, MM Docket No. 87-7, Second Further Notice of Proposed Rulemaking, FCC 96-438, released November 7, 1996, and Review of the Commission's Regulations Governing Attribution of Broadcast and Cable/MDS Interests, MM Docket No. 94-150, Review of the Commission's Regulations and Policies Affecting Investment in the Broadcast Industry, MM Docket No. 92-51, and Reexamination of the Commission's Cross-Interest Policy, Further Notice of Proposed Rulemaking, MM Docket No. 87-154, FCC 92-436, released November 7, 1996.

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)	
Television Satellite Stations)	MM Docket No. 87-8
Review of Policy and Rules)	

To: The Commission

COMMENTS OF BET HOLDINGS INC.

BET Holdings, Inc. hereby submits its comments in the above-captioned proceeding related to broadcast national ownership limits. BET is a cable television entertainment business that reaches over 45 million cable households through its cable programming services, BET Cable Network, BET on Jazz, and Action Pay-Per-View. BET also produces feature length films through its ventures with BET Film Productions, BET Pictures, and United Image Entertainment. BET has also partnered with Microsoft to develop on-line programming and interactive software products for African-American market consumers.

The Federal Communications Commission ("FCC" or "Commission") must evaluate the cumulative impact of recent changes to broadcast television rules before it adopts the proposed rules in this and related broadcast ownership proceedings.^{1/} The FCC's decisions in these

^{1/} To assess the impact on consolidation and diversity of ownership in TV broadcasting, the FCC must analyze the overall impact of its pending actions in the DTV licensing proceeding as well as the following ownership/attribution proceedings. 1) Broadcast Television National Ownership Rules (MM Docket No. 96-222); Review of the Commission's Regulations Governing Broadcast Television (MM Docket No. 91-221); Television Satellite Stations Review of Policy and Rules (MM Docket No. 87-8), Notice of Proposed Rulemaking, FCC 96-437; released November 7, 1996 (hereinafter, "National

proceedings will ultimately determine whether new entrants will have any opportunity to participate in broadcasting as it moves to the digital age, or whether regulatory and competitive entry barriers will be so high that incumbent broadcasters will dominate the broadcast marketplace. BET urges the Commission to adopt final rules in this and related broadcast ownership and attribution proceedings that 1) avoid further concentration of broadcast ownership and 2) eliminate market entry barriers for new broadcast entrants.

I. BET Supports Modification Of The Commission's Rules To Include Intermarket Satellite Television Stations In Calculating National Ownership Reach.

The Commission should modify its existing rules to include intermarket TV satellite stations in its calculation of national audience reach. The exemption for satellite stations, originally adopted in 1984, was based on the fact that satellites could not originate local programming.^{2/} The Commission has since amended the satellite rules to allow satellites to originate local programming. BET supports the Commission's conclusion that intramarket satellites should continue to be exempted, because they serve the same audience as the primary station. Satellite stations that serve different markets, however, can provide local programming and extend a broadcasters' reach to a different potential audience. BET agrees with prior comments from the Office of Communication of the United Church of Christ that "exemption of satellites from the national multiple ownership rules will inevitably squeeze out small

Ownership Proceeding"); 2) Review of the Commission's Regulations Governing Broadcast Television, MM Docket No. 91-221 and Television Satellite Stations Review of Policy and Rules, MM Docket No. 87-7, Second Further Notice of Proposed Rulemaking, FCC 96-438, released November 7, 1996 ("Local Ownership Proceeding"), and Review of the Commission's Regulations Governing Attribution of Broadcast and Cable/MDS Interests, MM Docket No. 94-150, Review of the Commission's Regulations and Policies Affecting Investment in the Broadcast Industry, MM Docket No. 92-51, and Reexamination of the Commission's Cross-Interest Policy, Further Notice of Proposed Rulemaking, MM Docket No. 87-154, FCC 92-436, released November 7, 1996 (hereinafter, "Attribution Proceeding").

^{2/} Memorandum Opinion and Order, Gen. Docket No. 83-1009, 100 FCC 2d 74, 79 (1985).

entrepreneurs and new entrants"^{3/} by enabling large group owners to transfer costs among stations and eliminate competition from small operators. Thus, BET supports the proposal to include population covered by intermarket satellites toward the 35% national ownership cap. Accurate calculation of audience reach will ensure a reasonable amount of diversity in ownership and programming on a national level, and prevent undue concentration of ownership.

However, if all satellite stations receive DTV allotments, BET also supports a broad attribution of satellite stations. The 6 MHz DTV allocation can be used for multiple streams of broadcasting, or for other nonbroadcast wireless services.^{4/} If the Commission allocates a DTV 6 MHz station to the satellite station as well as the main station, the broadcasting power within the market increases at least four-fold. The result would be substantially increased market power for incumbents that would create insurmountable entry barriers for competing stations. Therefore, if the Commission allocates a DTV channel to a satellite station that serves the same audience as the main station, the station audience should be counted towards both the 35% national ownership cap and the local ownership limits as well.^{5/}

^{3/} See Comments of Office of Communication of the United Church of Christ, Et. Al., in Television Satellite Stations Review of Policy and Rules, MM Docket No. 87-8, Filed October 10, 1991, at 7.

^{4/} Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service, Fourth Report and Order, MM Docket No. 87-268, released December 27, 1996, at 4.

^{5/} In other comments BET advocates that TV satellite stations do not receive a free "give away" DTV channel. There is no public policy or statutory justification for such an action. (See BET DTV comments).

II. Television Local Marketing Agreements ("LMAs") Should be Treated the Same as Radio LMAs.

BET believes LMAs for television should be attributed for local and national ownership purposes if the station brokers more than 15% of its programming. This is consistent with the current broadcast radio regulations.^{6/} Thus, BET supports the Commission's proposal to attribute LMA stations for local ownership purposes,^{7/} and believes the brokered station's audience should be also counted for purposes of calculating national audience reach. Giving new television operators access to programming available from an LMA should make it easier for new entrants to access programming options, without destroying diversity of programming in local markets, because program suppliers would be incentivized to provide such content to new entrants.

III. BET supports the Commission's adoption of a market definition based on Neilson's Designated Market Areas ("DMA").

The definition of relevant television market is critical because the number of television households in each market in which an entity's station is located is used to calculate the entity's national audience reach. BET supports the Commission's proposal to use Neilson DMAs for the purpose of calculation national ownership reach.^{8/} The current system using Areas of Dominant Influence ("ADIs") no longer receives routine updates. Hence, continued reliance on the ADI system would yield inaccurate measurement of market share. Accurate measurement is

^{6/} Revision of Radio Rules and Policies, Report and Order, MM Docket No. 91-140, 7 FCC Rcd 2755, 2784 (1992), clarified, 7 FCC Rcd 6387 (1992), further clarified, 9 FCC Rcd 7183 (1994). In the context of radio, the Commission originally attributed LMA stations in calculating national ownership limits. However, the Commission has since eliminated national ownership restrictions for broadcast radio stations.

^{7/} See Comments of BET in the local ownership proceeding, filed concurrently herewith.

^{8/} BET also supports the use of DMAs to define local ownership markets. See Comments of BET filed concurrently herewith in response to the Commission's Second Further Notice of Proposed Rulemaking in Review of the Commission's Regulations Governing Television Broadcasting, FCC 96-438, released November 7, 1996 (hereinafter, "Local Ownership Proceeding").

fundamental to the Commission's goal of ensuring diversity in ownership and programming through its 35% ownership cap.

DMA market definitions are updated regularly and "attempt to capture the actual viewership patterns and each county is assigned to a unique television market." ^{9/} Since the measurement of audience reach relies, in large part, on accurate market definition, BET supports the Commission's decision to use DMAs to measure national ownership reach. Adoption of the DMA system will further the Commission's goal of fostering broadcast diversity through effective enforcement of the national ownership limit.

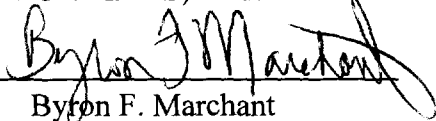
IV. Conclusion

BET encourages the Commission to include intermarket satellite station audience in calculating national ownership reach, and to adopt DMAs as the market for measuring national audience reach. These two rule modifications will ensure that national audience reach is calculated accurately. Such modifications will promote diversity in broadcasting at the national

level by providing accurate standards for calculating the 35% national audience reach. The Commission should also attribute LMA stations toward the local and national audience cap.

Respectfully submitted,

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